No. 82-1912

IN THE

Supreme Court of the United States

JAMES FREDERICK BROWN,

Petitioner,

versus

STATE OF FLORIDA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

SHELDON YAVITZ, ESQUIRE
with him on this Petition,
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QUESTION PRESENTED FOR REVIEW

Does Petitioner's conviction for possession of marijuana violate the due process clause of the Fourteenth Amendment to the United States Constitution where the proof of trial shows that contraband was present at Petitioner's jointly occupied home but fails to establish Petitioner's knowledge of such contraband beyond and to the exclusion of every reasonable doubt.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties.

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CASES CITED:

REFERENCE TO REPORTS

Petitioner was convicted in the Circuit Court for the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

Decision of the District Court of Appeals of Florida, Fourth District published 412 So.2d 420 (Fla. 4th DCA 1982).

Decision of the Supreme Court of Florida issued March 3rd, 1983, *Brown v. State*, contained in appendix

INVOCATION OF JURISDICTION

Petitioner seeks to review by petition for writ of certiorari pursuant to Rule 17 of U.S. Supreme Court Rules the decision of the Florida Supreme Court issued in the instant case on March 3rd, 1983. No timely motion for rehearing was timely filed in the Florida Supreme Court.

Jurisdiction to review the final judgment of the Florida Supreme Court is conferred pursuant to 28 USC § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the Constitution of the United States:

> "Section 1. Citizens of the United States.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On April 26th, 1978, police officers executed a search warrant at a residence owned by Petitioner. When the warrant was served, Petitioner opened the door and was seated by the officers in the living room. There were two persons living in the house with Petitioner at the time and they were also present when the warrant was executed. Small amounts of marijuana were found throughout the house in the following places;

(a) Five grams in an ashtray on the coffee table in the living room.

(b) Fifty-four grams in a plastic cup in the door panel inside the refrigerator.

(c) Eighty-two grams in a *locked* beer dispenser in the kitchen.

(d) A few grams in a coffee cup in the cabinet above the beer dispenser.

(e) Several bags of seeds in the garage.

(f) A container of seeds in the kitchen cabinet.

(g) A bottle of seeds on the floor in the family room.

Petitioner was charged with possession of marijuana in excess of five (5) grams, possession of hashish and possession of PCP. The jury acquitted Petitioner of the latter two charges.

At the close of the State's case which showed essentially the service of the warrant and the inventory of the house, Petitioner moved for a directed verdict of acquittal on the grounds that the evidence was insufficient to establish guilty knowledge on behalf of Petitioner. (R. pg. 197) Said motion was denied. (R. pg. 200)

At the close of all the evidence and before the submission of the cause to the jury said motion was renewed and denied once again. (R. pg. 230) Petitioner was convicted of possession of marijuana in excess of five grams in violation of Section 893.13 I (e) Florida Statutes (1971) and sentenced to serve one year's imprisonment in the state penitentiary.

Motion for new trial was denied and Petitioner appealed to the District Court of Appeals for the State of Florida, Fourth District. On April 14th, 1982, the District Court issued its opinion. Said decision contained a majority concurring and dissent opinion. 412 So.2d 420 (Fla. 4th DCA 1982).

The District Court furthermore certified the case to the Florida Supreme Court as being of great public importance.

The Florida Supreme Court issued its decision on March 3rd, 1982, affirming Petitioner's conviction.

Thereupon Petitioner appeals to this Court.

ARGUMENT

The due process clause of the Fourteenth Amendment requires the State in criminal prosecutions to prove the guilt of the Defendant beyond a reasonable doubt. *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed. 2d 368 (1973).

Petitioner in the instant case was convicted of possessing more than five (5) grams of marijuana in his home in the Circuit Court in and for Palm Beach County, Florida, and sentenced to one year's incarceration in the state penitentiary. The evidence at trial established that marijuana seeds, residue, and plant matter was found throughout Petitioner's home during the execution of a search warrant on April 26th, 1978. Petitioner resided at the house, along with two (2) other individuals, who were all present during the execution of the warrant.

Since the Petitioner was not in actual physical possession of the marijuana, the conviction had to rest on adequate basis of constructive possession under Florida law. *Sindrich v. State*, 322 So.2d 589 (Fla. 1st DCA 1975); *Wale v. State*, 397 So.2d 738 (Fla. 4th DCA 1981). However, the proof adduced at trial was insufficient to establish proof beyond a reasonable doubt that Petitioner had actual guilty knowledge of the contraband and dominion and control over same. The law is well-established that a State court conviction which is devoid of evidentiary support violates the due process clause of the Fourteenth Amendment. *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed. 2d 654 (1960); *Adderly v. Florida*, 385 U.S. 39, 87 S.Ct. 242 17 L. Ed.2d 149 reh. den. 385 U.S. 1020, 87 S.Ct. 658, 17 L.Ed.2d 559 (1966).

In the instant case, no statements by Petitioner were adduced at trial. No contraband was found upon Petitioner's person. According to the dissenting opinion of Associate Judge Leonard Rivkind in *Brown v. State*, 412 So.2d 420 (Fla. 4th DCA 1982) published at page 426,

> "The proofs sub judice fall short of stripping the defendant of the presumption of innocence. The proofs considered by the jury fall within the category of a mere probability of guilt and not proof of guilt beyond and to the exclusion of every reasonable doubt."

The due process clause of the Federal Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. Thus a state defendant who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of facts to find guilt beyond a reasonable doubt states a federal constitutional claim. Evidence which has a tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence cannot by itself rationally support a conviction of a crime beyond a reasonable doubt as is required by the due process clause of the Fourteenth Amendment. This Court has held that the constitutional necessity in a criminal trial of proof of guilt beyond a reasonable doubt as guaranteed by due process is not confined to those defendants who are morally blameless; even a thief is entitled to claim that he has been unconstitutionally convicted and imprisoned as a burglar. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 reh. den. 444 U.S. 890, 100 S.Ct. 195 (1979).

The evidence adduced in the instant case is clearly susceptible to the reasonable hypothesis that the other joint occupants owned or possessed the contraband. Proof of guilty knowledge sufficient to establish guilt beyond a reasonable doubt was not adduced.

Petitioner's conviction violates the due process clause of the Fourteenth Amendment. Petitioner respectfully submits that this Court grant his petition for writ of certiorari and order briefs on the merits.

CONCLUSION

WHEREFORE, Petitioner respectfully requests this Honorable Court to grant the Writ of Certiorari.

Respectfully submitted,

Sheldon Yavitz, Esq per B.P.S.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 2nd day of May, 1983, to Jim Smith, Attorney General, Tallahassee, Florida 32304, and to Robert L.

Bogen, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401.

Sheldon Yavitz, Esq. per DPS.

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APPENDIX "A"

James Frederick BROWN, Appellant,
v.
STATE of Florida, Appellee.

No. 79-459.

District Court of Appeal of Florida,
Fourth District.

April 14, 1982.

Defendant was convicted before the Palm Beach County Circuit Court, William C. Williams, III, J., for possession of marijuana in excess of five grams, and he appealed. The District Court of Appeal, Beranek, J., held that the facts brought out at trial were sufficient to create a jury question as to defendant's constructive possession of marijuana; while two other persons lived in the house with defendant, he owned the house and had superior possessory rights; and given that he lived in his own home literally in midst of all the seized drugs and paraphernalia, which were in plain view, a jury could reasonably infer that he had dominion and control over the premises and its contents.

Judgment and sentence affirmed.

Anstead, J., concurred specially, with opinion.

Rivkind, Leonard, Associate Judge, dissented, with opinion.

1. Drugs and Narcotics Key 107

In order to convict an accused of constructive possession, the State must prove that he had dominion and control over the contraband, had knowledge that it was within his presence, and had knowledge of its illicit nature. West's F.S.A. § 893.13(1)(e).

2. Drugs and Narcotics Key 114

If the area in which a contraband substance is found is within the exclusive possession of the accused, his knowledge of its presence, and his ability to maintain control over it, may be inferred, but if the area is only in his joint possession, his knowledge of the presence of the contraband on the premises and his ability to maintain control over it will not be inferred but must be established by other proof; this proof may consist of circumstantial evidence from which a jury might properly infer that the accused had knowledge of the presence of the contraband and an ability to control it. West's F.S.A. § 893.13(1)(e).

3. Drugs and Narcotics Key 126

Facts brought out at trial were sufficient to create a jury question as to the defendant's constructive possession of marijuana; while two other persons lived in the house with defendant, he owned the house and had superior possessory rights; and given that he lived in his own home literally in midst of all the seized drugs and paraphernalia, which were in plain view, a jury could reasonably infer that he had dominion and control over the premises and its contents. West's F.S.A. § 893.13(1)(e).

Robert L. Saylor of Saylor, Ingalsbe & Cohen, North Palm Beach, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and Robert L. Bogen, Asst. Atty. Gen., West Palm Beach, for appellee.

BERANEK, Judge.

This is an appeal from a conviction for possession of marijuana in excess of five grams in violation of Section 893.13 (1)(e), Florida Statutes (1977). The appellant was charged with possession of marijuana in excess of five grams, possession of hashish, and possession of PCP. The jury acquitted the appellant of the latter two charges.

The appellant raises numerous points on appeal, only one of which merits discussion; that is, the sufficiency of the evidence as to constructive possession.

During the evening hours of April 26, 1978, law enforcement officers executed a search warrant at a residence owned by the appellant. The residence had been under surveillance for approximately one year. During that period of time, the appellant had been observed entering and leaving the house on a number of occasions. When the warrant was served, the appellant opened the door and was seated by the officers in the living room. There were two persons living in the house with the appellant, and they were present when the warrant was executed. Marijuana was found in the following places: (a) five grams in an ash tray on the coffee table in the living room, (b) 54 grams in a plastic cup in the door panel inside the refrigerator, (c) 826 grams in a locked beer dispenser in the kitchen, (d) some amount in a coffee cup in the cabinet above the beer dispenser, (e) several bags of seeds in the

garage, (f) a container of seeds in the kitchen cabinet, and (g) a bottle of seeds on the bar in the family room. A search also disclosed the following narcotic paraphernalia: (a) a glass mirror, (b) a strainer, (c) a razor, (d) plastic bags and cigarette papers on the kitchen counter, (e) surgical clips on the coffee table in the living room, (f) pipes and containers in the garage, (g) spoons, papers, mirrors, and plastic funnels in the bar in the family room, (h) a bottle of manitol (a cutting agent) in the garage, (i) six pipes, hashish, and 150 milligrams of PCP on the bar shelves in the family room, (j) hashish in a car belonging to one of the residents parked outside the home, and (k) other drugs found in one resident's bedroom. At issue is whether the State presented a prima facie case of constructive possession based on these facts.

[1, 2] In order to convict an accused of constructive possession, the State must prove that he had dominion and control over the contraband, had knowledge that the contraband was within his presence, and had knowledge of the illicit nature of the contraband. *Wale v. State*, 397 So.2d 738 (Fla. 4th DCA 1981); *Hively v. State*, 336 So.2d 127 (Fla. 4th DCA 1976). If the area in which a contraband substance is found is within the exclusive possession of the accused, his knowledge of its presence, and his ability to maintain control over it, may be inferred. If the area is only in his joint possession, his knowledge of the presence of the contraband on the premises and his ability to maintain control over it will not be inferred but must be established by other proof. This proof may consist of circumstantial evidence from which a jury might properly infer that the accused had knowledge of the presence of the contraband and an ability to control it. *Wale v. State, supra.*

[3] We believe that the facts brought out at trial were sufficient to create a jury question as to the appellant's

constructive possession of the marijuana. This is not a situation where three people shared an apartment as co-tenants or roommates with equal rights in that apartment. Here the appellant owned and lived in the house and had exercised possessory rights. He received mail there, paid the household bills, and was residing there immediately prior to the events in question. The marijuana and narcotic paraphernalia were in plain view. Given that the appellant lived in his own home literally in the midst of all the seized drugs and paraphernalia, a jury could reasonably infer, as it did in this case, that the appellant had dominion and control over the premises and its contents. See *United States v. Davis*, 562 F.2d 681 (D.C.Cir. 1977); *United States v. Herron*, 567 F.2d 510 (D.C.Cir. 1977).

Notwithstanding our conclusion that the evidence was sufficient to sustain appellant's conviction we recognize that the case law in this area is far from clear. This issue is further addressed in Judge Rivkind's dissent and Judge Anstead's special concurrence. Because this has been a recurrent problem which has proven troublesome to trial courts and appellate courts alike we hereby certify the following questions to the Supreme Court as being of great public importance:

1. DOES OWNERSHIP AND JOINT OCCUPANCY OF A PREMISES WHERE ILLEGAL DRUGS ARE DISCOVERED IN PLAIN VIEW, IN THE PRESENCE OF THE OWNER, CONSTITUTE SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR CONSTRUCTIVE POSSESSION AS TO THE OWNER OR AS TO A LESSEE UNDER THE SAME CIRCUMSTANCES?

2. WHERE TWO OR MORE PERSONS JOINTLY OCCUPY PREMISES AND ILLEGAL DRUGS ARE DISCOVERED IN PLAIN VIEW, IN THEIR PRESENCE, IS SUCH PROOF, WITHOUT MORE, SUFFICIENT TO SUPPORT A CONVICTION FOR CONSTRUCTIVE POSSESSION AS TO EACH PERSON?

The judgment and sentence of the trial court are hereby affirmed.

ANSTEAD, J., concurs specially, with opinion.

RIVKIND, LEONARD, Associate Judge, dissents, with opinion.

ANSTEAD, Judge, specially concurring:

I concur in Judge Beranek's opinion and agree that the questions certified are of great public importance. The concept of constructive possession has proven to be a difficult concept to define and, once defined, even more difficult to apply to facts similar to those present herein. In essence, at issue is whether an owner and co-tenant may, simply by reason of his knowledge of the presence of a controlled substance on the premises, be deemed to be in possession of such substance. As Judge Rivkind notes, there are numerous Florida appellate decisions which appear to hold that evidence similar to that produced herein is insufficient to establish constructive possession. There are, of course, also as noted by Judge Rivkind, cases which reach a contrary result.

On the other hand, when one considers the definition of constructive possession contained in the standard jury

instructions and given to the jury here, it is easier to understand how the jury could find the evidence sufficient:

> Possession may be actual or constructive. If a thing is in the hand, or on the person, or in a bag or container in the hand or on the person, or is so close as to be within ready reach and is under the control of the person, it is in the actual possession of that person.
>
> If a thing be in a place over which the person has control and knowledge of its presence, or in which the person has hidden or concealed it, it is in the constructive possession of that person.
>
> Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In such case, each of such persons is legally in possession of that article.

This instruction permits conviction based upon evidence of knowledge and control over the place where the contraband is located, in this case a residence, as opposed to evidence of control over the contraband itself. The instruction further provides for joint possession thereby clearing the way for joint occupants of a residence to be subject to conviction for constructive possession where there is evidence that they had knowledge of the presence of the contraband. However, as noted by Judge Rivkind, there are numerous cases which appear to hold that in cases of joint possession there must not only be evidence of knowledge, there must also be independent evidence of control of the contraband itself. If

this analysis is correct, it would appear that the cited case law and the instruction are in conflict.

Underlying all of this is the question of how far the legislature intended to go in restricting a person's contact with illegal drugs. Was the legislative net intended to catch persons who simply had joint control over premises in which they knew that others possessed contraband? Or did the legislature intend that only those who had some legal possessory interest in the contraband, or intent to possess, were to be held criminally responsible? The case law cited by Judge Rivkind would appear to suggest the latter while the standard jury instruction would suggest the former. In simply prohibiting actual or constructive possession the legislature has given us little guidance on this issue. Ordinarily, however, in order for a person to be guilty of criminal conduct he must have intended to do the act which has been made unlawful, here possession of illicit drugs. That being so it would appear that the state should be required to prove that the defendant intended to possess the contraband contrary to the provisions of the law. No such requirement is contained in the standard jury instruction and there is little discussion of this matter in the case law. Perhaps that is what is meant by ability to "control." In any case we are all in agreement that the law is far from clear on this issue and a resolution by the Supreme Court will be welcomed.

RIVKIND, LEONARD, Associate Judge, dissenting:

The facts are fully detailed in Judge Beranek's opinion. While the reported cases involving constructive possession of narcotics have not been a model of consistency, on the whole, nevertheless, similar evidence as exists sub judice has

resulted in numerous reversals of convictions.[1/] The cases

[1/] The following convictions were reversed: *Smith v. State*, 279 So.2d 27 (Fla. 1973). Illegal drugs found along with woman's costume jewelry in a dresser drawer in bedroom jointly occupied by defendant and his wife. Court held that knowledge cannot be inferred because defendant is head of household; *D. K. W. v. State*, 398 So.2d 885 (Fla. 1st DCA 1981). Appellant and co-defendant admitted smoking marijuana which was discovered in a public place, behind a wall at a school, in special proximity equally near both boys. The co-defendant testified that it was his marijuana; *Shad v. State*, 394 So.2d 1114 (Fla. 1st DCA 1981). Marijuana was discovered in trunk of automobile in which defendant was a passenger concealed under a blanket on top of which were clothes belonging to defendant; *Gaynus v. State*, 380 So.2d 1174 (Fla. 4th DCA 1980). Defendant did not own but occupied premises with others where drugs or paraphernalia were discovered in a bedroom, briefcase, kitchen cupboards and pantry; *Thompson v. State*, 375 So.2d 633 (Fla. 4th DCA 1979). Defendant and two other men present when illegal drugs discovered in a bedroom where defendant kept his clothes. Evidence did not support finding defendant was the exclusive occupant of the bedroom. Exclusive occupancy, not occupancy alone, proves constructive possession; *Daudt v. State*, 368 So.2d 52 (Fla. 2d DCA 1979). Defendant was go-between in sale of marijuana. Defendant knew of presence but no evidence the marijuana belonged to him or was under his control; *Falin v. State*, 367 So.2d 675 (Fla. 3d DCA 1979). Hotel room registered to defendant and occupied by him and girl friend. Illegal drugs found in a suitcase containing a BB gun owned by defendant. Defendant was not present when search occurred; *Clark v. State*, 359 So.2d 458 (Fla. 3d DCA 1978). Marijuana found in a handball container located in a dresser drawer in bedroom occupied by defendant and his wife; *Manning v. State*, 355 So.2d 166 (Fla. 4th DCA 1978). Marijuana found in unlocked center console with defendant behind the wheel of parked automobile in which four other persons were present. Held that even if defendant owned the automobile (not established) he had only joint possession and control over the vehicle. There was no evidence defendant knew of presence of marijuana. Passengers had equal access and mere proof of ownership

alone of a vehicle does not permit an inference of knowledge of presence; *Brownlee v. State*, 354 So.2d 120 (Fla. 3d DCA 1978). Marijuana found in a plastic bag on a night stand located between two beds in a bedroom which defendant admitted was his room. A young female was in one of the two beds located in that room; *Doby v. State*, 352 So.2d 1236 (Fla. 1st DCA 1977). Illegal drugs secreted in defendant's wheelchair. Other inmates of prison had access to wheelchair out of defendant's presence; *Ellis v. State*, 346 So.2d 1044 (Fla. 1st DCA 1977). Defendant was owner of premises but out of town during search. Illegal drugs found in kitchen which was easily accessible to all persons entering the premises; *Jordan v. State*, 344 So.2d 1294 (Fla. 3d DCA 1977). Marijuana found in apartment in which defendant resided with female roommate; *Britton v. State*, 336 So.2d 663 (Fla. 1st DCA 1976). This is the "plain smell" case in which the odor of marijuana emanated from a trailer in which defendant and two others were present. No one was smoking. Substantial quantity of marijuana found in trailer. The reversal may have been based on illegal search; *Hively v. State*, 336 So.2d 127 (Fla. 4th DCA 1976). Defendant was the operator of a borrowed automobile in which another was a passenger. A bag of marijuana was in close proximity to defendant. There were two roaches and a roach clip in the ash tray, a pipe on the center console and the smell of marijuana was present in the automobile. There was evidence that others had been in the automobile before defendant borrowed it and that defendant did not see the bag, roaches or roach clip; *Tomlin v. State*, 333 So.2d 500 (Fla. 2d DCA 1976). House owned by defendant in which others rented rooms. Marijuana discovered in unspecified location; *Townsend v. State*, 330 So.2d 513 (Fla. 4th DCA 1976). Contraband in automobile held not in exclusive possession of passenger; *Thiel v. State*, 326 So.2d 460 (Fla. 4th DCA 1976). Marijuana found under dashboard of automobile in which defendant was passenger; *Moore v. State*, 325 So.2d 466 (Fla. 4th DCA 1976). Controlled substance and paraphernalia found in an automobile jointly occupied by defendant and its co-owner; *Sindrich v. State*, 322 So.2d 589 (Fla. 1st DCA 1975). Marijuana found in trunk of rental truck. Defendants were college students hired to drive the truck to Columbus, Ohio from Miami. Defendants denied knowledge of contents of truck; *Willis v. State*, 320 So.2d 823 (Fla. 4th DCA 1975). Barbituates found under bed in which defendant had been resting and also in dresser drawer. Apartment occupied by defendant and his wife. Defendant had been out of town immediately

are rare in which a constructive possession conviction survives an appeal.[2/]

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prior to search and several persons had been seen going in and out of the apartment the evening of the search. Defendant denied all knowledge of presence; *Taylor v. State*, 319 So.2d 114 (Fla. 2d DCA 1975). Defendant was visitor in close proximity to marijuana in the living room while others were also present; *Hilding v. State*, 291 So.2d 111 (Fla. 4th DCA 1974). Defendant drove wife to post office where she received in her rental box an envelope containing a Christmas card and packet of cocaine. Wife as co-defendant had been acquitted by jury; *Mosley v. State*, 281 So.2d 590 (Fla. 4th DCA 1973). Drugs found in apartment occupied by defendant's paramour. Defendant occupied apartment sporadically; *Medlin v. State*, 279 So.2d 41 (Fla. 4th DCA 1973). Defendant owned residence but was not present at time of search. Defendant's brother and two other persons were present when search was conducted; *Griffin v. State*, 276 So.2d 191 (Fla. 4th DCA 1973). Contraband discovered in various places of residence occupied by defendant. Many persons, including the defendant, were seen going in and out of the residence during the week prior to the raid; *Torres v. State*, 253 So.2d 450 (Fla. 3d DCA 1971). Marijuana was found in closet and bathroom of apartment rented to another but occupied by defendant for several days; *Kirtley v. State*, 245 So.2d 282 (Fla. 3d DCA 1971). Defendant rented motel facilities which he shared with a female. Many persons were seen going in and out on the day in question; *Langdon v. State*, 235 So.2d 321 (Fla. 3d DCA 1970). Marijuana found in bus which defendant and others lived. Eight persons were present in bus when contraband discovered; *Markman v. State*, 210 So.2d 486 (Fla. 3d DCA 1968). Defendant was co-lessee of apartment and not present when contraband was found. Other persons also had access to premises. See, also, *Frank v. State*, 199 So.2d 117 (Fla. 1st DCA 1967) and *Spataro v. State*, 179 So.2d 873 (Fla. 2d DCA 1965).

[2/] The following convictions were affirmed: *Wale vs. State*, 397 So.2d 738 (Fla. 4th DCA 1981). Search of residence in which defendant, his wife and children resided disclosed a bag containing marijuana in defendant's closet and bore his name and address; *Robinson v.*

I find myself in agreement with much of Judge Anstead's specially concurring opinion. However, I am unwilling to join the majority affirmance solely because of what I perceive to be unequal treatment when this case is considered in light of numerous reversals involving facts which, when compared herewith, are indistinguishable.

Since the defendant was not in actual physical possession of the marijuana, the conviction had to rest on constructive possession. As stated in *Sindrich v. State*, 322 So.2d 589,

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State, 389 So.2d 1067 (Fla. 4th DCA 1980). Drugs found in defendant's bedroom and in his clothes in house occupied by defendant and others; *Sanders v. State*, 378 So.2d 880 (Fla. 1st DCA 1980). Facts that defendant owned the automobile and other occupants denied knowledge of the marijuana were sufficient to withstand motion to dismiss; *Thames v. State*, 366 So.2d 1261 (Fla. 1st DCA 1979). Marijuana found in drawer in bedroom when defendant was sleeping. Other persons shared occupancy of residence. The drawer contained mail addressed to defendant and his picture hung on wall of bedroom; *Winchell v. State*, 362 So.2d 992 (Fla. 3d DCA 1978). Defendant alone in hotel occupied by her and boy friend, the latter being the registered guest, when marijuana and pipe found in plain view on dresser; *Norman v. State*, 362 So.2d 444 (Fla. 1st DCA 1978). Defendant admitted he knew marijuana was in barn on farm he rented; *Norris v. State*, 351 So.2d 729 (Fla. 3d DCA 1977). Defendant owner and occupant of apartment in which marijuana was found when defendant and another present at time of search. No evidence apartment jointly owned with another person; *Dixon v. State*, 343 So.2d 1345 (Fla. 2d DCA 1977). Smell of marijuana and sight of smoke emanating from an automobile occupied by more than one person; *Zicca v. State*, 232 So.2d 414 (Fla. 3d DCA 1970). Marijuana in open view in bus owned and operated by defendant with three other persons in vehicle. See, also, *Davis v. State*, 350 So. 2d 834 (Fla. 2d DCA 1977) and *Lattimore v. State*, 214 So.2d 771 (Fla. 3d DCA 1968) (lottery tickets).

591 (Fla. 1st DCA 1975), the following principles are applicable to constructive possession cases:

(1) The State must establish beyond a reasonable doubt that the accused knew of the presence of the narcotic drugs on the premises.

(2) If the premises are in the exclusive possession and control of the accused, knowledge of the presence of the narcotic drugs coupled with his ability to maintain control over them may be inferred, but the inference is rebuttable and not conclusive.

(3) If the premises are in the joint possession of the accused, knowledge of the presence of drugs, the drug's presence and ability to maintain control will not be inferred, but must be established by proof.

(4) Proof of knowledge of the presence of drugs may consist of evidence establishing actual knowledge, or evidence of incriminating statements and circumstances from which a jury might lawfully infer knowledge by the accused of the drug's presence.

(5) Such inference must be reasonable from proven facts but not based upon inference.

The proofs sub judice fall short of stripping the defendant of the presumption of innocence. The proofs considered by the jury fall within the category of a mere probability of and not proof of guilt beyond and to the exclusion of every reasonable doubt. Precedent commands reversal.

Ergo, I dissent.

APPENDIX "B"

SUPREME COURT OF FLORIDA

No. 62,081

JAMES FREDERICK BROWN, Petitioner,

v.

STATE OF FLORIDA, Respondent.

[March 3, 1983]

McDONALD, J.

In *Brown v. State*, 412 So.2d 420 (Fla. 4th DCA 1982), the district court certified the following questions to this Court:

1. DOES OWNERSHIP AND JOINT OCCUPANCY OF A PREMISES WHERE ILLEGAL DRUGS ARE DISCOVERED IN PLAIN VIEW, IN THE PRESENCE OF THE OWNER, CONSTITUTE SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR CONSTRUCTIVE POSSESSION AS TO THE OWNER OR AS TO A LESSEE UNDER THE SAME CIRCUMSTANCES?

2. WHERE TWO OR MORE PERSONS JOINTLY OCCUPY PREMISES AND ILLEGAL DRUGS ARE DISCOVERED IN PLAIN VIEW, IN THEIR PRESENCE, IS SUCH PROOF, WITHOUT MORE, SUFFICIENT TO SUPPORT A

CONVICTION FOR CONSTRUCTIVE POSSESSION AS TO EACH PERSON?

Id. at 422. We have jurisdiction pursuant to article 7, section 3(b)(4), Florida Constitution. We answer the questions in the affirmative and approve the opinion of the district court.

Law enforcement officers searched Brown's house, in his presence, pursuant to a search warrant and found several pounds of marijuana and lesser quantities of hashish and PCP. The district court has detailed the locations of the contraband - in the living room, the kitchen, the family room, the garage, and one bedroom[1] which was literally scattered throughout the house and much of which was in plain view. A jury convicted Brown of constructive possession of marijuana. On appeal he questioned whether the facts presented created a prima facie case of constructive possession. The district court found the facts presented at trial sufficient to create a jury question as to Brown's constructive possession of the marijuana, but certified the instant questions because of confusion in the applicable case law.[2]

"Constructive possession exists where the accused without physical possession of the controlled substance knows of its presence on or about his premises and has the ability to

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[1] 412 So.2d at 422.

[2] Judge Rivkind in dissent has noted numerous constructive possession cases. 412 So.2d at 424-25 n. 1 - n.2.

maintain control over said controlled substance." *Hively v. State*, 336 So.2d 127, 129 (Fla. 4th DCA 1976). To establish constructive possession, the state must show that the accused had dominion and control over the contraband, knew the contraband was within his presence, and knew of the illicit nature of the contraband. *Wale v. State*, 397 So.2d 738 (Fla. 4th DCA 1981). If the premises where contraband is found is in joint, rather than exclusive, possession of a defendant, however, knowledge of the contraband's presence and the ability to control it will not be inferred from the ownership but must be established by independent proof. *Wale; Frank v. State*, 199 So.2d 117 (Fla. 1st DCA 1967).

Brown claims that he could be convicted of constructive possession on the instant facts only if the jury impermissibly piled inference upon inference. We do not find, however, that the jury would have to have drawn an impermissible inference. In the instant case the knowledge element is met because the contraband was in plain view in common areas throughout the house. The dominion and control element is met because Brown, as resident owner of his home, had control over the common areas. Therefore, the elements of knowledge and control have been satisfied,[3/] and, as the district court found, the facts presented at trial were sufficient to create a jury question as to constructive possession. Given the evidence presented, the jury could easily have rejected every reasonable hypothesis of innocence. We answer the first question in the affirmative.

[3/] There is no indication that Brown has ever argued that he did not know of the illicit nature of the seized drugs.

The second question, except for the element of ownership, is virtually identical to the first question, i.e., discovery of illegal drugs in plain view in the presence of the residents. We likewise answer the second question in the affirmative. This answer is consistent with prior cases such as *Smith v. State*, 279 So.2d 27 (Fla. 1973) (contraband in jointly occupied dresser drawer, not in plain view, knowledge not shown), and *Taylor v. State*, 319 So.2d 114 (Fla. 2d DCA 1975) (contraband found in plain view, but defendant, a guest, had no control over the premises).

We hold, therefore, that joint ownership, with or without ownership of the premises, where contraband is discovered in plain view in the presence of the owner or occupant is sufficient to support a conviction for constructive possession. The decision of the district court is approved.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON, EHRLICH and SHAW, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Fourth District - Case No. 79-459

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